DALE WILLS
C.D.C. No. J-16405
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IN PRO SE

ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DALE WILLS,

Petitioner,

v.

JAMES TILTON, et al.,

Respondents.

/

Case No. C-07-3354 CW (PR)

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

A reading of the following facts and argument will affirmatively establish that Respondents' Motion to Dismiss is submitted in bad faith for the purposes of deception and as a delay tactic to maliciously perpetuate the unlawful restraint of Petitioner's liberty of freedom in violation of the Federal Constitution. Respondents' Motion to Dismiss should be rejected in its entirety.

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ARGUMENT

Respondents assert that Petitioner failed to comply with the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244. See Respondents' Motion to Dismiss ("RMD"), p. 7, lines 21-24. Respondents are woefully incorrect. Petitioner has not "failed" in way shape or form. Rather it was counsels' "failure" that caused the delay in the discovery of the legal bases of the claims raised in this proceeding.

I. Equitable Tolling

It is hornbook law that limitations periods are "customarily subject to 'equitable tolling,'" unless tolling would be "inconsistent with the text of the relevant statute." See Young v. United States, 122 S. Ct. 1036, 1040 (2002) (citations omitted). Congress must be presumed to draft limitations periods in light of this background principle. See id.

The doctrine of equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." See Federal Election Comm'n v. Williams, 104 F. 3d 237, 240 (9th Cir. 1996) (citation omitted). The equitable doctrine is read into every federal statute of limitations. See id.

In the present case, Respondents assert that the statute of limitations began to run on August 9, 1997. See RMD, p. 8, line 24. This is incorrect. The statute of limitations did NOT begin to run until Petitioner discovered counsels' fraud in

concealing the legal bases of the claims raised in this proceeding. See Rotella v. Wood, 528 U.S. 549, 555 (2000). Petitioner discovered the legal bases of these claims in March of 2005 when he came upon the People v. Davis case. See Verified Petition for Writ of Habeas Corpus ("VPWHC"), p. 12, lines 13-17. Petitioner cannot be faulted for counsels' ineffectiveness lest the constitutional right to effective assistance of counsel be wholly meaningless. It is not always the case . . . that a defendant can be faulted for failing to obtain timely review of a constitutional claim. See e.g., Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 405 (2001). A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance . . .; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. See Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (citation omitted). Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. See id. Without counsel the right to a fair trial itself would be of little consequence . . ., for it is through counsel that the accused secures his other rights. See id., at 377.

Because Petitioner has a constitutional right to the effective assistance of counsel at trial, see Strickland v. Washington, 466 U.S. 668 (1984), and on appeal, see Evitts v. Lucey, 469 U.S. 387, 396 (1985), and because the prevailing

professional norms require investigation into prior convictions, see Rompilla v. Beard, 125 S. Ct. 2456 (2005)[1]; Dretke v. Haley, 124 S. Ct. 1847 (2004) (Dictum); Cook v. Lynaugh, 821 F. 2d 1072 (5th Cir. 1987); People v. Marquez, 188 Cal. App. 3d 363 (5th Dist. 1986); People v. Guizar, 180 Cal. App. 3d 487 (1st Dist. 1986); People v. Zimmerman, 102 Cal. App. 3d 647 (1st Dist. 1980), and because once Petitioner relayed the facts concerning the prior conviction to all counsel involved, see VPWHC, pp. 7-8 and 10, counsel were presumed to be aware of their duty to obtain evidence of the unlawfulness of the prior, see VPWHC, Exhibit "A," ¶¶ 3-5, for the successful prosecution of a motion to strike the prior conviction, see Pesple v. Sumstine, 36 Cal. 3d 909, 916 (Cal. 1984) (A motion to strike is generally the proper vehicle for challenging the constitutionality of a prior conviction alleged in a pending case), counsels' failure to file a motion to strike the prior conviction, in conjunction with their fraudulent concealment of the legal basis of the invalid prior conviction, is the legal cause for the delayed presentation of the claims raised in this proceeding. Attorney error that constitutes ineffective assistance of counsel is cause. See Coleman v. Thompson, 501 U. S. 722, 753-54 (1991). Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state

[1] As is more-fully discussed below, it may be that the Rompilla decision entitles Petitioner to statutory tolling under the "new-rule" provision of the AEDPA. See 28 U. S. C. § 2244 (d)(1)(C).

interests that federal habeas review entails. See Coleman v. Thompson, supra, 501 U. S. at 754. Cf. O'Neal v. McAninch, 513 U. S. 432, 443 (1995) (the State normally bears responsibility for the error that infected the initial trial).

Application of the Ninth Circuit's decision in Spitsyn v. Moore, 345 F. 3d 796 (9th Cir. 2003) to the facts of this case is particularly appropriate. In agreeing with the Second and Third Circuits, the Spitsyn Court found that "equitable tolling is appropriate when a delay in filing a habeas petition resulted from sufficiently egregious performance of counsel." See id., at 800. The Court noted that although he was hired nearly a year in advance of the deadline, Spityn's attorney completely failed to prepare and file a petition. See id., at 801. The Court also noted that Spitsyn and his mother contacted counsel numerous times, by telephone and in writing, seeking action, but these efforts proved fruitless. See id. The Court concluded that this misconduct of Spitsyn's attorney was sufficiently egregious to justify equitable tolling of the one-year limitations period under AEDPA. See id.

Certainly, the actions of Petitioner's state trial and appellate counsel suffice to meet Spitsyn's requirement of "sufficiently egregious performance of counsel" as it mirrors the actions of Spityn's counsel. Indeed, the actions of Petitioner's counsel is even more egregious than the actions of Spitsyn's attorney. Petitioner's counsel actually concealed the legal basis of the claims. No such circumstance existed in Spitsyn. The only really materially distinguishable difference in the facts of this case and that of Spitsyn, which actually

tips the scale sharply in favor of Petitioner's position, is that Petitioner has a Federal Constitutional right to the effective assistance of counsel at trial, see Strickland v. Washington, supra, and on appeal, see Evitts v. Lucey, supra, whereas Spitsyn had no right to counsel at all. See Lawrence v. Florida, 127 S. Ct. 1079, 1085 (2007).

Similarly, once Petitioner came upon the People v. Davis case in March of 2005, see VPWHC, p. 12, and hence discovered counsels' fraudulent concealment of the legal bases of the claims raised in this proceeding, Petitioner exercised "due diligence" to protect his rights.[2] Petitioner contacted all counsel involved demanding corrective action. See VPWHC, p. 12; Declaration of DALE WILLS ("Wills I Dec.") in Support of Petitioner's Memorandum of Points and Authorities in Opposition to Respondents' Motion to Dismiss, ¶ 3. And when Petitioner realized that no assistance from counsel would be forthcoming, he commenced legal research into the aspects of state and federal habeas corpus law, ineffective assistance of trial and appellate counsel law, and prosecutorial misconduct law so that he could prosecute habeas proceedings on his own behalf. See VPWHC, p. 13; Wills I Dec., ¶ 5. Due to his confinement to the Security Housing Unit ("SHU"), however, Petitioner's access to the law library was even more restricted than normal and this significantly stymied his efforts to complete the

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[2] "[D]ue diligence" is an inexact measure of how much delay is too much. See Johnson v. United States, 544 U. S. 295, 309 n. 7 (2005). As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules. See Spitsyn v. Moore, supra, 345 F.3d at 801.

necessary legal research. See Wills I Dec., ¶ 5. The Ninth Circuit has recognized that "confinement makes compliance with procedural deadlines difficult because" "[p]ro se prisoners are limited in their access to legal materials," see e.g., Rand v. Rowland, 154 F. 3d 952, 958 (9th Cir. 1998) (en banc), cert. denied, 527 U. S. 1035 (1999), and that a lack of access to adequate law library materials may amount to an impediment to justify equitable tolling. See Roy v. Lampert, 465 F. 3d 964, 970-71 (9th Cir. 2006). And even when Petitioner was allowed access to the law library, he was required to dedicate some of his time to conduct legal research on other matters as well. See Wills I Dec., ¶ 5 (section 1983 action challenging conditions of confinement); see also Respondents' Notice of Lodging ("RNL"), Exhibit "D" (habeas corpus petition challenging conditions of confinement); see id., Exhibit "F" (same). Petitioner cannot be forced to choose between challenging his criminal conviction and sentence and his conditions of confinement. "[A]n inmate cannot be forced to sacrifice one constitutionally protected right solely because one is respected." See Allen v. City & County of Honolulu, 39 F. 3d 936, 940 (9th Cir. 1994). Cf. Lewis v. Casey, 518 U. S. 343, 355 (1996) (The tools [Bounds v. Smith, 430 U. S. 817 (1977)] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement) (Brackets and emphasis added).

All in all, it took Petitioner a time period of two (2) months in his attempt to contact all counsel involved for corrective action, see Wills I Dec., ¶¶ 3-4, nine (9) months to conduct the legal

research necessary to prepare a meritorious memorandum of points and authorities in support of the actual petition, see Wills I Dec., ¶ 6, and approximately forty-five (45) days in which to actually piece together a coherent, meritorious memorandum of points and authorities in support of the actual petition for the state superior court. See id.

Despite all the pitfalls Petitioner sufferred, i.e., counsels' failure to take corrective action, and inadequate access to legal research materials, he exercised "due diligence" to protect his rights to collateral relief by attempting to contact all counsel involved for corrective action. And when this proved futile, Petitioner commenced legal research so that he could prosecute collateral proceedings in his own behalf. Petitioner did all of this as soon as he was aware of the legal bases for the claims raised in this proceeding. This should be sufficient. Due "diligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction." See Johnson v. United States, supra, 544 U. S. at 308.

Whether the nine (9) months Petitioner dedicated to conducting legal research of the issues before actually filing his state superior court petition is too much is unknown. But it must be remembered that if state collateral review is unsuccessful, the federal petition is limited to the federal claims fairly exhausted in state court. And if Petitioner were to file his federal petition without conducting adequate legal research, he could potentially be subject to sanctions under Federal Rule of Civil Procedure 11 if the filing is

found to be baseless. Frivolous filings are those that are both baseless and made without a reasonable and competent inquiry. See Estate of Blue v. County of Los Angeles, 120 F. 3d 982, 985 (9th Cir. 1997). Indeed, as with an attorney, it would be cavalier of Petitioner to file his petition without conducting the necessary legal research especially since Petitioner has only one chance at presenting these claims. Giving due regard for the inadequate law library access and other actions being prosecuted, see infra pp. 6-7, the nine (9) months Petitioner spent conducting legal research before filing the petition was absolutely necessary for an adequate presentation of the claims raised in this proceeding. See Wills I Dec., ¶ 6. The United States Supreme Court recognized the importance of the pre-filing legal research inquiry in Bounds v. Smith, 430 U. S. 817 (1977). The Bounds Court said:

> "It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and, if so, what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a pro per prisoner. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation."

See id., at 825-26.

As the foregoing indicates, Petitioner put forth a good-faith effort under extremely restricted circumstances to conduct the necessary legal research prior to cavalierly filing just any old claim, and as such Petitioner should be rewarded for his effort with equitable tolling. Tolling accommodates effort, not inaction.

See Welch v. Carey, 350 F. 3d 1079, 1083 (9th Cir. 2003) (en banc).

Petitioner also exercised "due diligence" in the prosecution of state post-conviction collateral remedies as well. And although the California Supreme Court denied the petition as untimely, citing In re Robbins, 18 Cal. 4th 770, 780 (Cal. 1998), it is indisputably clear that such a conclusion is objectively unreasonable in light of the facts presented.[3] Robbins stands for the proposition that "[s]ubstantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the claim and the legal basis for the claim." See id., at 780 (Emphasis added)

But because Petitioner did not discover "the legal basis for the claim" until March of 2005, see VPWHC, p. 12, again because counsel failed to timely raise the claims and actually concealed the legal bases for the claims, his state petitions cannot be untimely under state law. And because the state petitions cannot be untimely under state law, it necessarily follows, a fortiori, that all the state petitions were "properly filed" entitling Petitioner to statutory tolling under the AEDPA. See 28 U.S.C. § 2244(d)(2); Carey v. Saffold, 536 U.S. 214, 219-20 (2002); Nino v.

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[3] Not surprisingly, Respondents have not asserted procedural default on state untimeliness grounds. Nor could they. Not only would such a claim be frivolous, but, under the facts of this case, the state-law determination is interwoven with federal law. The state court's determination of whether Petitioner established "good cause" for the delay requires a determination of whether Petitioner was denied the effective assistance of counsel. This is exactly what the state superior court did when it denied the petition. See RNL, Exhibit "H" (addressing both timeliness and IAC claims). Because the state law basis for decision is not independent of federal law, federal habeas review of the claims in this proceeding is not prohibited. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

Galoza, 183 F. 3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U. S. 1104 (2000).

There are other assertions made by Respondents that need be addressed. First, Respondents assert that Petitioner filed his federal petition on June 26, 2007. See RMD, p. 3, line 15, among other pages. Respondents are incorrect. Petitioner asserts that he mailed his federal petition to this Court on February 21, 2007, when he relinquished the same to prison officials for forwarding to this Court. See Declaration of DALE WILLS ("Wills II Dec.,") in Support of Petitioner's Motion for Order Directing Clerk to Endorse File Papers Retroactively, ¶ 3. Because Petitioner relinquished his federal petition to prison officials for forwarding to this Court on February 21, 2007, the federal petition should be deemed "filed" on February 21, 2007. See Houston v. Lack, 487 U. S. 266, 276 (1988); Saffold v. Newman, 250 F. 3d 1262, 1268 (9th Cir. 2001), rev'd on other grounds sub nom., Carey v. Saffold, 536 U. S. 214 (2002).

Second, Respondents assert that Petitioner is not entitled to equitable tolling under the doctrine of "fraudulent concealment" because Petitioner must show affirmative misconduct on the part of the defendant but that Respondent, as the defendant here, has not committed any misconduct. See RMD, p. 11., lines 4-12. Respondents' assertions amount to nothing other than an attempt at "verbal karate" and should disregarded as wholly frivolous. It is trial and appellate counsel who are the "would-be-defendants" once a suit is commenced against them.

Moreover, Respondents' attempt to have this proceeding dismissed as time barred can easily be construed as affirmative

misconduct as it is an attempt to perpetuate the unlawful restraint on Petitioner's liberty of freedom. Respondents are simply attempting to cover up the State's failure to provide Petitioner with the effective assistance of trial and appellate counsel. Respondents and their counsel, as agents of the State that has deprived Petitioner of his right to the effective assistance of counsel as a constitutional matter, should not be rewarded for the State's failure to provide Petitioner with the effective assistance of counsel by having these proceedings dismissed as time barred. This would result in an egregious miscarriage of justice by saying ineffective assistance counsel claims are no longer cognizable. Indeed, Respondents and their counsel come to this Court with unclean hands. And as the United States Supreme Court recently recognized, a court can still determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred. See e.g., Day v. McDonough, 126 S. Ct. 1675, 1684 (2006).

This is just such a case where the interests of justice sharply favor adjudication on the merits.

Third, Respondents' citation to, inter alia, Rasberry v. Garcia, 448 F. 3d 1150, 1154 (9th Cir. 2006), for the rule "that ignorance of the law and lack of legal experience typically do not excuse prompt and timely filing, even for a pro se incarcerated prisoner," see RMD, p. 12, lines 5-6, is not legally tenable under the facts presented here. As Respondents themselves recognize, see RMD, p. 12, lines 1-3, it was "[d]ue to [Petitioner's] lack of adequate knowledge of the law and sole reliance on appointed counsel," that caused the delay here. (Emphasis added). And, as

the Ninth Circuit recognized in Roy v. Lampert, supra, "[o]ne event may have multiple causes." See 465 F. 3d at 973. But because Petitioner had an absolute right to the effective assistance of counsel at trial and on appeal, it is counsels' omissions that are the legal cause of the delay, not Petitioner's lack of adequate knowledge of the law.

Finally, Respondents assert that apart from the claim concerning the invalid prior conviction, Petitioner knew of many of the claims in 1997 and cannot credibly claim both that he pushed for appellate counsel to raise these claims in 1997 but did not know of the legal significance of them until March of 2005. See RMD, p. 12-13. But Respondents' assertion is nothing other than an attempt to deceive this Court into believing that Petitioner has been untruthful in his claim of discovery of the legal bases of the claims herein raised. But nowhere in his petition or supporting memorandum of points and authorities does Petitioner ever claim these other grounds as "independent bases for relief." Quite the contrary. Aside from the invalid prior conviction and prosecutorial misconduct issues, the remaining issues are not presented as "independent bases for relief," but, rather as aggravating circumstances to demonstrate both the extent of counsels' deficient performance and prejudice involved. See Kimmelman v. Morrison, supra, 477 U. S. at 386; Mak v. Blodgett, 970 F. 2d 614, 622 (9th Cir. 1991), cert. denied, 507 U. S. 951 (1993); Cooper v. Fitzharris, 586 F. 2d 1325, 1333 (9th Cir. 1978) (en banc), cert. denied, 440 U. S. 974 (1979).

Nevertheless, the IAC claim for the invalid prior conviction is in and of itself sufficiently egregious to justify relief.

"[T]he right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." See Murray v. Carrier, 477 U. S. 478, 496 (1986). This particular IAC claim is just such a claim, as it had a substantial, adverse ripple effect on the proceedings, i.e., caused the jury's deliberative processes to be infected with hatred towards Petitioner, and increased his sentence by eleven (11) years.

Clearly, Respondents' Motion to Dismiss is submitted in bad faith for the sole purposes of delaying resolution of this proceeding on the merits and to perpetuate their unlawful restraint upon Petitioner's liberty of freedom.

II. Statutory Tolling / State Created Impediment

The one-year limitation period of the AEDPA shall run from, inter alia, "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." See 28 U. S. C. § 2244 (d)(1)(B).

Under this provision, it is Petitioner's position that because he had an absolute right to expect that the State would provide him with the effective assistance of counsel at trial and on appeal, it necessarily follows, a fortiori, that the States failure to provide Petitioner with the effective assistance of counsel constitutes an "impediment to filing an application created by State action in violation of the Constitution . . . of the United States. . . ." Where a petitioner defaults a claim as a result of the denial of the

right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. See Coleman v. Thompson, supra, 501 U. S. at 754.

Respondents' reliance on Dunker v. Bissonnette, 154 F. Supp. 2d 95, 104 (D. Mass. 2001); Ramos v. Carey, 2003 WL 21788799, * 2 (N. D. Cal. July 31, 2003) to the contrary, see RMD, p. 13, is simply no match for the Supreme Court's decision in Coleman v. Thompson, supra. See e.g., Hope v. Pelzer, 536 U.S. 730, 747 (2002) (recognizing that district court decisions are no match for circuit precedent).

What's more, although the "impediment" was initially "removed" once Petitioner came upon the People v. Davis case, see VPWHC, p. 12, lines 13-17, once counsel was informed of the issue and failed to take corrective action, see Wills I Dec., ¶¶ 3-4, the "impediment" became reimposed because the State had the opportunity to take corrective action but failed to avail itself of the opportunity. In addition, prison officials' failure to allow Petitioner adequate access to the law library, see Wills I Dec., ¶ 5, also constitutes an "impediment." See e.g., Roy v. Lampert, supra, 465 F. 3d at 970-71.

Once again, as explained above, see ante at p. 12, Respondents are simply attempting to cover up the State's failure to provide Petitioner with the effective assistance of trial and appellate counsel. Respondents and their counsel, as agents of the State that has deprived Petitioner of his right to the effective assistance of counsel as a constitutional matter, should not be

rewarded for the State's failure to provide Petitioner with the effective assistance of counsel by having these proceedings dismissed as time barred. This would result in an egregious miscarriage of justice by saying ineffective assistance of counsel claims are no longer cognizable. Indeed, Respondents and their counsel come to this Court with unclean hands. And as the United States Supreme Court recently recognized, a court can still determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred. See Day v. McDonough, supra, 126 S. Ct. at 1684.

This is just a case where the interests of justice sharply favor adjudication on the merits.

Clearly, Respondents' Motion to Dismiss is submitted in bad faith for the sole purposes of delaying resolution of this proceeding on the merits and to perpetuate their unlawful restraint upon Petitioner's liberty of freedom.

III. Statutory Tolling / New Rule Made Retroactive

The one-year limitation period of the AEDPA shall run from, inter alia, "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See 28 U. S. C. § 2244 (d) (1) (C).

In Dodd v. United States, 545 U. S. 353 (2005), the United States Supreme Court had occasion to interpret the nearly identical provision at 28 U. S. C. § 2255¶ 6 (3). The Dodd Court had to determine exactly when the one-year limitation period under

28 U.S.C. § 2255 ¶ 6 (3). The parties offerred differring versions on the subject. The Petitioner asserted that the limitations period runs from the date on which the right asserted was made retroactively applicable. See Dodd v. United States, supra, 545 U.S. at 357. The Respondent asserted that the limitations period runs from the date on which the Supreme Court initially recognized the right asserted. See id. The Dodd Court adopted the Respondent's version. The Court held that the text of ¶ 6 (3) settles the dispute. See id. It unequivocally identifies one, and only one, date from which the 1-year limitation period is measured: "the date on which the right asserted was initially recognized by the Supreme Court." See id.

Thus, we must identify the date in which the Supreme Court initially recognized the constitutional right asserted by Petitioner. The constitutional right relied upon by Petitioner was announced by the United States Supreme Court in Rompilla v. Beard, 545 U.S. 374 (2005), on June 30, 2005.

Because the one-year limitation period of 28 U.S.C. § 2244 (d)(1)(C) commenced on June 30, 2005, Petitioner, absent other applicable tolling provisions/doctrines, had until June 30, 2006, in which to file his petition in this Court. And although Petitioner did not file his petition until February 21, 2007, see ante at p. 11, as set forth above, see parts I and II, supra, Petitioner is entitled to equitable tolling and statutory tolling under 28 U.S.C. § 2244 (d)(1)(B) because prison officials' failure to allow Petitioner adequate access to the law library constituted a state created impediment, a legal cause for

the delay in Petitioner's filing of his Federal petition. In addition, Petitioner is entitled to statutory tolling under 28 U.S.C. § 2244 (d)(2), see ante at pp. 10-11, during the entire period in which the state court's were considering the habeas petitions - from March 20, 2006, the date the petition was filed in the state superior court, until February 7, 2007, the date the petition was denied by the California Supreme Court.

In a nutshell then, because Petitioner is entitled to tolling under other provisions of law, e.g., equitable tolling, as well as statutory tolling under 28 U.S.C. § 2244(d)(1)(B) and (d)(2), the one-year limitations period did not even begin to run until February 7, 2007. And since Petitioner filed his petition in this Court on February 21, 2007, see ante at p. 11, the Federal petition was filed well within the one-year limitation period of the AEDPA.

The next step we must undertake is whether the rule in Rompilla is "newly recognized"... "and [is] made retroactively applicable to cases on collateral review." The answer to this is most definately yes! In Rompilla, the Supreme Court, for the very first time, held that an attorney's failure to conduct an adequate investigation of prior convictions amounted to deficient performance, see 545 U.S. at 383, that was sufficiently prejudicial to sustain a finding of ineffective assistance of counsel. See id., at 390. Thus, the Rompilla Court announced a "new rule." And because Rompilla is a habeas proceeding, it necessarily follows then, a fortiori, that it has been "made retroactively applicable to cases on collateral review" as the holding is dependent on retroactivity, i.e., Rompilla

could not have obtained the relief he did unless the decision called for retroactive application.

Clearly, Respondents' Motion to Dismiss is submitted in bad faith for the sole purposes of delaying resolution of this proceeding on the merits and to perpetuate their unlawful restraint upon Petitioner's liberty of freedom.

IV. Actual Innocence Exception

Even assuming, arguendo, that Petitioner has exceeded the one-year limitation period of the AEDPA and has failed to demonstrate an entitlement to equitable / statutory tolling as urged in parts I, II, and III, supra, see ante at pp. 2-19 (though any such assumption should not be construed as a concession as it is merely stated for the purpose of this point of argument), this Court may still reach the merits of any defaulted constitutional claims if Petitioner "falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" See Schlup v. Delo, 513 U. S. 298, 314-15 (1995). "[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence," see Sawyer v. Whitley, 505 U. S. 333, 339 (1992), and "serves as 'an additional safeguard against compelling an innocent man to suffer from an unconstitutional loss of liberty,' guaranteeing that the ends of justice will be served in full." See McCleskey v. Zant, 499 U. S. 467, 495 (1991).

Although demanding in all cases, the precise scope of the miscarriage of justice exception depends on the nature of the challenge brought by the habeas petitioner. See Calderon v. Thompson, 523 U. S. 538, 559 (1998). For example, if the petitioner asserts actual innocence of the underlying crime, the

Schlup "more likely than not" standard applies. See Calderon v. Thompson, supra, 523 U. S. at 559. If the petitioner asserts actual innocence of a sentence enhancer, the Sawyer "clear and convincing evidence" standard applies. See id.

As will be more fully discussed below, Petitioner asserts actual innocence of both the underlying crime and a sentence enhancer.

A. Petitioner is Actually Innocent of the Underlying Crime

Petitioner asserts that he is actually innocent of the crimes with which he was charged. See RNL, Exhibit "J," pp. 32-33 (Cal. Supreme Court Habeas Petition); VPWHC, p. 8. These charges include: First Degree Burglary; Grand Theft; and Possession of Stolen Property.[4] See RNL, Exhibit "A," pp. 1-2.

In order to have otherwise procedurally defaulted claims decided on the merits, a habeas petitioner must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" See Schlup v. Delo, supra, 513 U. S. at 327. This "standard does not require absolute certainty about the petitioner's guilt or innocence." See House v. Bell, 126 S. Ct. 2064, 2077 (2006). Rather, "the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." See Schlup, 513 U. S. at 329. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence. See id., at 327. To be credible, such a claim requires a petitioner to support

[4] The jury reached a verdict of not guilty for the charge of Possession of Stolen Property. See RNL, Exhibit "A," p. 7.

his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence - that was not presented at trial. See Schlup v. Delo, supra, 513 U. S. at 324. This "new evidence" requirement is not limited to just "newly discovered evidence." See House v. Bell, supra, 126 S. Ct. at 2077. Rather "[t]he habeas court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence wrongly excluded or to have become available only after the trial.'" See Schlup, 513 U. S. at 328 (footnote omitted). Thus, even "newly presented" but previously available evidence "may be considered in analyzing [an actual innocence] claim." See Sistrunk v. Armenakis, 292 F. 3d 669, 673 n. 4 (9th Cir. 2002) (en banc).

Here, the constitutional violations that occurred at trial are ineffective assistance of counsel and prosecutorial misconduct.

1. Ineffective Assistance of Counsel

First, we have counsel's ineffectiveness at the motion to suppress evidence hearing. Had it not been for counsel's deficient and prejudicial performance at the hearing, the bicycle and incriminating statements allegedly made by Petitioner [5] would have been suppressed as "fruit-of-the-poisonous-tree" because the police falsely arrested Petitioner

[5] Petitioner vehemently denies he ever told police he purchased the bicycle from an unknown individual in the Lucky's parking lot.

for public intoxication as a ruse to unlawfully detain Petitioner pending investigation into ownership of the bicycle. See Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus ("VPWHC Memo."), p. 10. In addition, counsel failed to urge exclusion of any reference to Petitioner's sobriety or that Petitioner possessed the bicycle on the ground the police maliciously destroyed material, exculpatory evidence, i.e., refused to allow Petitioner a blood alcohol test and refused to take fingerprints of the bicycle. See id., at pp. 10-11.

It is not surprising that the police engaged in such deceitful misconduct to secure Petitioner's conviction. Given the fact that Deputy WALTERS allowed the true perpetrator to escape by failing to give chase, he had to do everything in his power to avoid embarrassment by his blunder. And what better person to take the blame than Petitioner. Having been convicted of burglary in the past, Petitioner was as good a suspect they could have hoped for having just fallen in their lap and all. In fact, Deputy WALTERS even attempted to trick Petitioner into signing a property receipt for the bicycle. See VPWHC, p. 7. Petitioner, of course, declined. See id.

And to make matters worse, the jury was not even properly instructed as to the reliability or trustworthiness of the so-called evidence that Petitioner was inebriated or possessed the bicycle, i.e., if it found the police's failure to allow a blood-alcohol test or take fingerprints of the bicycle was to prevent Petitioner from submitting evidence to the contrary it could disregard the so-called evidence. See e.g., Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (recognizing trial court's instructions to the jury that it could

disregard evidence). And because a court must presume that jurors remember and follow their instructions, see Weeks v. Angelone, 528 U. S. 225, 234 (2000), it must be presumed that the jury would have disregarded any reliance on the so-called evidence that Petitioner was inebriated or possessed the bicycle had the jury been so properly instructed. Under Schlup, this Court must consider what "properly instructed jurors would do." See Schlup v. Delo, supra, 513 U. S. at 329.

Absent introduction of the inadmissible, untrustworty evidence that Petitioner was inebriated or possessed the bicycle, it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Second, we have counsel's ineffectiveness in failing to obtain evidence that the alleged First Degree Burglary prior conviction was invalid. See VPWHC Memo, pp. 6-10. Had it not been for counsel's ineffectiveness in this regard, the alleged prior would not have been used to impeach Petitioner's testimony at trial. Indeed, the introduction of this alleged prior conviction had a profound, irreparable adverse impact on the jury's decision-making process for the remainder of the trial. When the jury heard of this prior conviction their facial expressions exhibited disgust and contempt towards Petitioner. See VPWHC, p. 9. And it is unlikely that the jury's guilty verdict was based on an objective review of the evidence given that its deliberations lasted only during the lunch break, approximately thirty-five minutes. Rather, the more rational conclusion is that jury's verdict was based upon passion or prejudice.

Absent introduction of this invalid prior conviction, it is more

likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

Finally, we have counsel's ineffectiveness in suborning Petitioner to commit perjury by falsely testifying that he had been drinking so as to support a fraudulent diminished capacity defense. See VPWHC Memo., pp. 11-12, and 15. Given that Petitioner has always maintained his innocence of the crime, see RNL, Exhibit "J," pp. 32-33; VPWHC, p. 8, Petitioner's testimony regarding his inebriation presents an irreparable aspect of internal inconsistency. See e.g., Florida v. Nixon, 543 U. S. 175, 191-92 (2005) (quoting Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L. Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence the attorney.")).

Absent this inconsistent evidence, it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

2. Prosecutorial Misconduct

The prosecutor committed egregious misconduct by impressing upon the jury a false fact the Petitioner sustained a prior conviction for First Degree Burglary while at the same time Petitioner was a resident of the address he was supposed to have burglarized. See VPWHC Memo., pp. 19-20. And as previously stated, the introduction of this invalid prior conviction had a profound, irreparable adverse impact upon the jury's decision-making process. So much so probably that the jury possessed a bias against Petitioner for the remainder of the proceedings undermining the fundamental fairness of the

trial. See e.g., Dyer v. Calderon, 151 F. 3d 970, 973 (9th Cir.) (en banc) (The bias or prejudice of even a single juror would violate a defendant's right to a fair trial.), cert. denied, 525 U. S. 1033 (1998). See also Gomez v. Vernon, 255 F. 3d 1118, 1122 (9th Cir. 2001) (While all may be fair in war, such is not the case in the judicial arena - the courtroom is not a battlefield).

Absent the prosecutor's misconduct, it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

B. Petitioner is Actually Innocent of a Sentencing Enhancer

Petitioner asserts that he is actually innocent of a prior conviction used as a sentence enhancer. See VPWHC, pp. 7-8 and Exhibit "A." This alleged prior consists of First Degree Burglary. See RNL, Exhibit "A," pp. 3-4.

In order to have otherwise procedurally defaulted claims decided on the merits, a habeas petitioner "must show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the" enhanced sentence "under the applicable state law." See Sawyer v. Whitley, supra, 505 U. S. at 336.

Here, the constitutional violations that occurred at the jury trial on the prior convictions are ineffective assistance of counsel and prosecutorial misconduct.

1. Ineffective Assistance of Counsel

Counsel was ineffective in failing to obtain evidence that the alleged First Degree Burglary prior conviction was invalid. See VPWHC Memo., pp. 6-10. Had it not been for counsel's omission in this regard, there is absolutely no way any reasonable juror would

have found Petitioner guilty of the prior conviction. Indeed, had counsel obtained the relevant evidence and filed a motion to strike the prior conviction at the appropriate time there would not have even been a jury trial on the prior conviction

Absent counsel's omission, Petitioner has shown by clear and convincing evidence that no reasonable juror would have found guilt beyond a reasonable doubt.

2. Prosecutorial Misconduct

The prosecutor committed egregious misconduct by falsely convincing the jury of the validity of the alleged First Degree Burglary prior conviction. This is an especially egregious act of misconduct given the fact that the prosecutor actually knew that Petitioner was a resident of the address he was alleged to have burglarized. "[T]he prosecutor's 'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" See e.g., Banks v. Dretke, 540 U. S. 668, 694 (2004).

Absent the prosecutor's misconduct, Petitioner has shown by clear and convincing evidence that no reasonable juror would have found guilt beyond a reasonable doubt.

Clearly, Petitioner has satisfied his burden of demonstrating that absent the constitutional violations, individually/cumulatively, he is actually innocent of the underlying crime for which he was charged as well as the prior conviction used as a sentence enhancer.

CONCLUSION

Accordingly, the foregoing facts and argument is persuasive that his federal petition is not untimely filed or, if untimely, that cause and prejudice resulting from trial counsels' ineffective

assistance entitles Petitioner to equitable and/or statutory tolling of the one-year period of limitation of the AEDPA or that Petitioner is entitled to consideration of the merits of the claims under the actual innocence exception.

WHEREFORE, Petitioner prays for the following:

1. That Respondents' motion to dismissed be DENIED with prejudice, and

2. The Petitioner's petition be ADJUDICATED on the merits.

DATED: Jan. 15, 2008

Respectfully Submitted,

By: Dale Wills
DALE WILLS
Petitioner In Pro Se

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DALE WILLS,
Plaintiff or Petitioner,

v.

Case Number: C-07-3354 CW (PR)

JAMES TILTON, et al.,
Defendant or Respondent.

PROOF OF SERVICE

I hereby certify that on January 15, 2008, I served a copy of the attached Memorandum of Points and Authorities in Opposition to Respondents' Motion to Dismiss,

by placing a copy in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the United States Mail at Corcoran, California.

(List Name and Address of Each Defendant or Attorney Served)

Office of the Attorney General
of the State of California
Attn: BRUCE ORTEGA, Esq., No. 131145
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

I declare under penalty of perjury that the foregoing is true and correct.

Dale Wille
(Name of Person Completing Service)

DALE WILLS
Petitioner In Pro Se